Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	CS Docket No. 99-230
Competition in Markets for the Delivery	)	
of Video Programming	)	

REPLY COMMENTS OF CORECOMM LIMITED

Robert D. Primosch
William W. Huber

WILKINSON BARKER KNAUER, LLP
2300 N Street, N.W.
Suite 700
Washington, D.C. 20037
(202) 783-4141

Its Attorneys

September 1, 1999

Table of Contents

EXECUTIVE SUMMARY i

I. INTRODUCTION AND STATEMENT OF INTEREST 1

II. DISCUSSION 5

A. THE PHENOMENON OF CONVERGENCE REQUIRES THAT CABLE'S MARKET DOMINANCE BE EVALUATED IN TERMS OF ITS IMPACT ON COMPETITION IN THE MARKET FOR ALL BROADBAND SERVICES, NOT JUST MULTICHANNEL VIDEO. 5

B. THE EXISTING PROGRAM ACCESS LAW AND THE CABLE BUREAU'S ENFORCEMENT THEREOF ARE NO LONGER ADEQUATE TO ENSURE THAT BROADBAND COMPETITORS WILL HAVE FULL AND FAIR ACCESS TO PROGRAMMING. 10

1. The Bureau Has Given Cable Programmers a Green Light to Avoid the Program Access Rules by Migrating Programming to Terrestrial Delivery. 10

2. *Vertical Integration Is Not the Exclusive Source of the Program Access Problem, and Thus Section 628's Vertical Integration Restriction Is Insufficient To Serve Its Intended Purpose* 19

3. *Ongoing MSO Consolidation Will Empower Incumbent Cable Operators to Demand and Receive Discriminatory Volume Discounts And Other Concessions from Cable Programmers.* 21

C. THE COMMISSION'S SIGNAL CARRIAGE RULES MUST ACKNOWLEDGE THAT ALTERNATIVE MVPDS HAVE NO MARKET POWER VIS-A-VIS LOCAL BROADCASTERS. 24

1. *Retransmission Consent* 24

2. *Must Carry* 26

D. THE COMMISSION'S RULES AND POLICIES FOR EXCLUSIVE CONTRACTS IN MDUS MUST TAKE INTO ACCOUNT THE WIDER IMPACT SUCH CONTRACTS HAVE ON DEPLOYMENT OF NON-VIDEO BROADBAND SERVICES. 27

III. CONCLUSION 28

EXECUTIVE SUMMARY

The initial comments filed in this proceeding by a variety of alternative multichannel video programming distributors ("MVPDs") reflect a consensus that the current regulatory framework in a number of areas must be reevaluated and modified to address recent marketplace and technological developments if *bona fide* competition is to exist. CoreComm Limited ("CoreComm") believes that this year's report to Congress will have much broader ramifications than in years past. The central issue in this year's proceeding is not merely limited to whether the current regulatory framework for multichannel video programming service promotes competition between incumbent cable operators and alternative MVPDs. Rather, the issue is whether CoreComm and other competing broadband service providers will have a full and fair opportunity to offer consumers a complete menu of bundled service offerings (including multichannel video). CoreComm submits that the best interests of American consumers will be served by a report to Congress that provides direct and specific guidance as to how the current regulatory framework should be changed to promote greater competition in the MVPD marketplace and, ultimately, the larger marketplace for broadband services.

In the area of program access, the Commission should address the problem of incumbents' migration of programming from satellite to terrestrial distribution technologies. Increasingly, terrestrial migration is being cited by regional sports networks as a justification for refusing competitors access to essential sports programming. This problem has been compounded by the Cable Services Bureau's constrained view of its jurisdiction in this area. CoreComm strongly believes that Congress passed the program access statute as an affirmative remedy to counteract cable's widespread abuse of its overwhelming market power vis-a-vis programmers and alternative MVPDs and, in so doing, invested the Commission with broad authority to address such problems. If, however, the Commission believes that it lacks the necessary jurisdiction to eliminate the threat of terrestrial migration, then it should recommend to Congress that Section 628 of the Communications Act be amended so that the program access law applies to satellite *and* terrestrially-delivered programming.

Similarly, the Commission should request that Congress amend Section 628 to apply to all programming regardless of how or by whom it is owned. By its terms, Section 628's program access requirements apply to programming that is "vertically integrated." Yet, as the Commission has previously recognized, it is cable's control over local distribution, not "vertical integration," that is the true source of the program access problem. All cable networks, vertically integrated or not, have the same economic incentive to placate incumbent cable operators either by refusing to sell their product to cable's competitors or by only making their product available under rates, terms and conditions that discriminate against cable's competitors. The Commission should address this problem by asking Congress to eliminate the vertical integration requirement from the program access statute and impose program access requirements on all cable programmers. In addition, to address a considerable competitive imbalance created by steep volume discounts offered exclusively to the large MSOs, the Commission should ask Congress to clarify that Section 548 requires programming vendors to cost-justify any such discounts.

The Commission's current prohibition on exclusive broadcast retransmission consent agreements is insufficient to deter broadcasters from imposing discriminatory retransmission consent agreements on alternative MVPDs because of consolidation and clustering which has led to tight cable MSO control over local distribution. Thus, the Commission's current prohibition on exclusive broadcast retransmission consent agreements is insufficient to deter broadcasters from imposing discriminatory retransmission consent agreements on alternative MVPDs. For this reason, the Commission should support pending legislation with regard to DBS "local into local" signals that would prohibit broadcast stations from engaging in discriminatory practices that prevent a multichannel video program distributor from obtaining retransmission consent. For similar reasons, CoreComm supports BellSouth's pro-competitive proposal advanced in the DTV proceeding for the adoption of an "overbuild" or "new entrant" exemption from any DTV must-carry rules the Commission may adopt in the future.

Finally, the Commission should not overlook the potential competitive impact of new policies under consideration by the Wireless Telecommunications Bureau in a separate proceeding concerning the important question of what should be done about exclusive contracts between incumbent cable operators and MDU owners that were entered into before MDU owners had an opportunity to choose among competing providers. If an integrated broadband service provider is precluded from offering its entire menu of broadband services including video because of a pre-existing exclusive contract, that contract may effectively preclude the provider from offering *any* non-video broadband services to that same property. CoreComm urges the Commission to develop a solution that will make Congress's vision of fully competitive, widely available and affordable broadband services a reality.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	CS Docket No. 99-230
Competition in Markets for the Delivery	)	
of Video Programming	)	

REPLY COMMENTS OF CORECOMM LIMITED

CoreComm Limited ("CoreComm"), by its attorneys, hereby submits it reply comments with respect to the FCC's *Notice of Inquiry* ("*NOI*") in the above-captioned proceeding.[1]

I. INTRODUCTION AND STATEMENT OF INTEREST

CoreComm is a full-service, integrated communications services provider which, through its wholly-owned operating subsidiaries, is delivering on the promise of the 1996 Telecommunications Act by providing competitive local exchange and long distance telephone, high-speed Internet access and data services, and other communications products and services to residential and business customers in the Ameritech and Bell Atlantic service regions. Through its Smart LEC strategy, CoreComm is creating a national, facilities-based broadband network to provide residential and business customers integrated "bundles" of telecommunications, Internet and entertainment services specifically tailored to the subscriber's individual needs. CoreComm's ultimate business objective is to enhance the customer value proposition by offering the widest

[1] FCC 99-148 (rel. June 23, 1999).

possible array of advanced broadband services, including telephone, Internet, and multichannel video services, delivered with extraordinary customer care at competitive prices. CoreComm therefore has a direct and substantial interest in Commission's annual report to Congress on the status of competition in the video marketplace, and in any Commission actions that might ensue therefrom.[2]

Though they differ in their particulars, the comments filed in this proceeding by cable's competitors reflect consensus on the following points:

- The growth of DBS notwithstanding, incumbent cable operators still dominate national and local markets for multichannel video programming services.[3]
- The accelerated consolidation of the largest cable MSOs and the associated trend towards clustering of cable television systems in large markets will promote further concentrations of market power and the likelihood of anticompetitive conduct in contravention of the Commission's program access rules.[4]
- The Commission's narrow view of its authority under the Cable Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") to resolve the program access problem is neither consistent with Congressional intent nor in the best interests of consumers.[5]

[2] CoreComm shares common executive management with NTL Incorporated ("NTL"), the largest broadband telecommunications provider in the United Kingdom and Ireland, as measured by number of customers. A cornerstone of NTL's operations is its nationwide fiber-optic broadband network, through which it provides bundled packages of telephone, multichannel video, Internet and interactive TV, high-speed data and other communications products and services to more than 1.9 million residential customers.

[3] *See, e.g.*, Comments of EchoStar Satellite Corporation, CS Docket No. 99-230, at 1-2 (filed Aug. 6, 1999) (the "EchoStar Comments"); Comments of The Wireless Communications Association International, Inc., CS Docket No. 99-230, at 4-6 (filed Aug. 6, 1999) (the "WCA Comments"); Comments of BellSouth Corporation, *et al.*, CS Docket No. 99-230, at 5-7 (filed Aug. 6, 1999) (the "BellSouth Comments").

[4] *See, e.g.*, BellSouth Comments at 8-11; Comments of Ameritech New Media, Inc., CS Docket No. 99-230, at 8-10 (filed Aug. 6, 1999) (the "Ameritech Comments"); Comments of Hiawatha Broadband Communications, Inc., CS Docket No. 99-230, at 4 (filed Aug. 6, 1999) (the "Hiawatha Comments").

[5] *See, e.g.*, Comments of RCN Corporation, CS Docket No. 99-230, at 19-23 (filed Aug. 6, 1999) (the "RCN Comments"); Ameritech Comments at 15-17; WCA Comments at 8-11; Comments of Direct TV, Inc., CS Docket No. 99-230, at 2-3 (filed Aug. 6, 1999).

- The Commission's prohibition on exclusive retransmission consent agreements will not deter broadcasters from imposing discriminatory retransmission consent agreements on alternative MVPDs at the behest of cable operators.[6]

- The Commission's cable inside wiring rules are not facilitating greater competition between incumbents and competitors in the MDU environment.[7]

- The Commission's annual report on the status of competition in the multichannel video marketplace should include recommendations to Congress that will clarify any questions as to the scope of the Commission's authority to address anticompetitive conditions in the MVPD marketplace.[8]

As discussed in greater detail below, CoreComm strongly supports the pro-competitive views summarized above, and hopes that the Commission will use the record in this proceeding to reassess its role in facilitating *bona fide* competition (or the lack thereof) in the MVPD marketplace. However, CoreComm also believes that this year's report to Congress (and the Commission's perspective on the issues raised therein) will have much broader ramifications than in years past. That is, the touchstone issue in this proceeding is not merely whether the current regulatory framework for multichannel video programming service promotes competition between incumbent cable operators and alternative MVPDs. Rather, the issue is whether CoreComm and other competing broadband service providers will have a full and fair opportunity to offer consumers a complete menu of bundled service offerings (including multichannel video) competitive with those of the "new" AT&T and other incumbent broadband providers in the new millennium. In this respect, this year's annual report will be the first that implicates the Commission's overriding

---

[6] *See, e.g.*, WCA Comments at 11; BellSouth Comments at 8-10; Comments of the American Cable Association, CS Docket No. 99-230, at 13-14 (filed Aug. 6, 1999) (the "ACA Comments").
[7] *See, e.g*, Ameritech Comments at 13-15; RCN Comments at 15-18.
[8] *See, e.g.*, Hiawatha Comments at 9-10; BellSouth Comments at 17-18; WCA Comments at 8-14; Ameritech Comments at 17.

mandate to accelerate widespread deployment of broadband services under Section 706 of the Telecommunications Act of 1996 (the "1996 Act").[9]

CoreComm therefore submits that the best interests of American consumers will be served by a report to Congress that provides direct and specific guidance as to how the current regulatory framework should be changed to promote greater competition in the MVPD marketplace and, ultimately, the larger marketplace for broadband services. Lawmakers have already indicated that they need the Commission's input in order to initiate meaningful legislative reform for cable's competitors, and, given the wider consequences of this year's report, it is imperative that the Commission respond in kind.[10] This sort of proactive approach is the only way to ensure that unprecedented events of the past year do not render the pro-consumer provisions of the 1996 Act and the 1992 Cable Act obsolete.

9Pub. L. No. 104-104, 190 Strat. 56 (1996).

[10]CoreComm notes that the Commission recently took a very encouraging step in the right direction by making a variety of specific legislative proposal to Congress in the agency's draft strategic plan for the 21st century. *See* "Chairman Kennard Delivers to Congress Draft Strategic Plan For 21st Century," *Public Notice* (rel. August 12, 1999). Among other things, the Commission recommended that Congress "[r]emove entry barriers and expand consumer access to competing providers of multichannel video programming and non-video telecommunications and information services to apartment houses, condominium buildings, and other multiple dwelling units when a resident requests service from the service provider." *See* Kennard, "A New FCC for the 21st Century," at 38 (August 1999) (available at http://www.fcc.gov./21st century/).

II. DISCUSSION

A. THE PHENOMENON OF CONVERGENCE REQUIRES THAT CABLE'S MARKET DOMINANCE BE EVALUATED IN TERMS OF ITS IMPACT ON COMPETITION IN THE MARKET FOR ALL BROADBAND SERVICES, NOT JUST MULTICHANNEL VIDEO.

In last year's annual report to Congress, the Commission found that "downstream local markets for the delivery of video programming remain highly concentrated" . . . [A]s of June 1998, the shares of the market participants, grouped by competing technologies, would be roughly: cable, 85.3%; DBS/HSD, 12.1%; wireless cable, 1.3%; and SMATV, 1.2%."[11] As recently as May of this year, the Commission found that cable still dominates the national MVPD market.[12] A recent report to Congress by the General Accounting Office ("GAO") similarly confirms that "the cable industry maintains a high share of the subscription television market nationally and is currently not very competitive."[13] As one prominent lawmaker recently put it, "[v]ideo competition is on the way, but we are not there yet."[14]

Moreover, the 1998 Report also reflected that the largest MSOs are expanding their already extensive control over distribution of programming in national and local markets via consolidation and "clustering" of cable television systems. Specifically, the Report indicated that a total of 34.4 million subscribers, or more than half of all cable subscribers in the United States, are served by

---

[11] *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 24284, 24363 (1998) (the "*Fifth Annual Report*").

[12] *See MCI Telecommunications Corporation, Assignor, and EchoStar 110 Corporation, Assignee*, FCC 99-109, at ¶¶ 15-16 (rel. May 19, 1999).

[13] "The Changing Status of Competition to Cable Television," United States General Accounting Office, Report to the Subcommittee on Antitrust, Business Rights, and Competition, Committee on the Judiciary, U.S. Senate, GAO/RCED-99-158, at 1 (July, 1999) (the "GAO Competition Report").

[14] Statement of Sen. Mike DeWine, Joint Hearing of Senate Judiciary Committee and Antitrust, Business Rights and Competition Subcommittee, "Broadband: Competition and Consumer Choice in High-Speed Internet Services and Technologies" (July 14, 1999) (the "DeWine Statement").

system clusters,[15] and the record in this proceeding confirms that clustering has accelerated to a blistering pace as cable MSOs regionalize their operations to achieve economies of scale.[16] Indeed, AT&T has made no bones about the fact that system clustering represents one of its primary motivations for acquiring TCI and, now, MediaOne and that it will continue to form system clusters in multiple markets if that transaction is approved.[17]

By now the Commission is well aware of how cable's control over distribution of programming worsens the program access environment for cable's competitors and thus precludes full and fair competition in the MVPD marketplace.[18] What has received less attention, however, is how cable's market power in the realm of video affects competition among all players in the post-convergence environment. It is beyond argument that the explosive growth of the Internet and the associated consolidation of the largest video, voice and high-speed Internet access providers have nearly eliminated the historical barriers between video, voice and data services and established "broadband" as the new competitive playing field in the communications marketplace.[19] The GAO report to Congress pinpoints the resulting dilemma for broadband competitors:

---

[15] *1998 Annual Report*, 13 FCC Rcd at 24221 (Table C-2).

[16] *See, e.g.*, BellSouth Comments at 6-8; Ameritech Comments at 9.

[17] *See Applications for Consent to the Transfer of Control of Licenses, MediaOne Group, Transferor, to AT&T Corp., Transferee*, Public Interest Statement at 30 (filed July 7, 1999) (the "AT&T/MediaOne Public Interest Statement").

[18] *See, e.g.*, BellSouth Comments at 4-14; Ameritech Comments at 9-10; RCN Comments at 18-20; WCA Comments at 6-8; Hiawatha Comments at 5-8.

[19] *See, e.g.*, Statement of C. Michael Armstrong, Chairman and CEO, AT&T Corp., Before the Senate Judiciary Committee (July 14, 1999) ("The cable box on your TV will not only deliver hundreds of channels and movies — it will be a virtual communications center. When you come home, you'll turn on the TV, the PC or telephone — which one is up to you — to retrieve your e-mail, voice messages or fax. If you want to get onto the Internet, the cable box will give you access. . . That same cable line that brings TV and the Internet into your home will give you multiple telephone lines."); Statement of Anna-Marie Kovacs, First Vice President, Janney Montgomery Scott, Before the Senate Judiciary Committee (July 14, 1999) ("The major players in each of these segments [cable, telephony, etc.] are trying to play in all segments, as they prepare for a world in which they expect a large part of the market to require bundled services. Thus, they are moving from their traditional areas of strength into new areas, concerned that they will not be able to defend their original position unless they are equally competitive in the other segments.").

> [T]he subscription television market could be affected by developments in the larger telecommunications market because other telecommunications companies, such as telephone companies, are attempting to provide consumers with "one-stop shopping" — that is, seeking to provide an array of services including telephone service, subscription television service, and Internet access. If several different types of companies — cable companies, telephone companies, electric companies, and companies using different kinds of "wireless" technologies — are successful in bringing a "bundle" of telecommunications services to consumers, competition among alternative delivery mechanisms — a cable wire, a telephone wire, an electric wire, and wireless — may develop. However, if one of the technologies that uses a wired connection to homes and businesses emerges as the most efficient, it could become the dominant means of delivering various telecommunications services, and greater competition for subscription television and other telecommunications services may not develop.[20]

In other words, competing broadband providers will find themselves stranded at the starting gate if they cannot offer packages of video, voice and/or high-speed Internet access services competitive with those of AT&T and other cable MSOs that will soon be offering subscribers a diverse menu of broadband services. AT&T's recent public interest showing in support of its proposed acquisition of MediaOne confirms that multichannel video is becoming an indispensable component of the broadband "mix":

> By enabling AT&T to provide packaged (as well as separate) voice, video, and Internet services to millions of American consumers on an expedited basis, the Merger will increase the incentive of local telephone companies and others to compete in the provision of multichannel video services. In such an environment, ILECs and others will be motivated to upgrade their networks to enable them to provide comparable packages that include video programming as well as other types of services. Indeed, there already is evidence that AT&T's plans to provide service packages are causing ILECs to seek ways to offer multichannel video services along with their traditional telephony services.[21]

---

[20] GAO Competition Report at 3.
[21] AT&T/MediaOne Public Interest Statement at 42.

Accordingly, anticompetitive conditions in the MVPD marketplace undercut competition and consumer choice in the wider market for broadband services by eliminating an essential category of service from a competitor's menu of broadband offerings. These consequences ensue from cable's market power, and it is in that broader context that the implications of cable's status in the MVPD marketplace must be evaluated. As noted above, however, there continues to be every indication that cable still enjoys overwhelming market power where multichannel video programming service is concerned, and that AT&T and other cable MSOs therefore already have a substantial head start toward becoming the dominant provider of broadband services in local markets throughout the United States.[22]

The potential impact of this scenario on consumers should not be underestimated. To the extent that lack of competition in the MVPD marketplace reduces competition in the wider market for broadband services, it increases the likelihood that broadband will become the exclusive domain of only the largest players, who in a noncompetitive environment will inevitably focus their efforts on deploying service in those more lucrative segments of the marketplace that provide the highest return on investment:

> The companies appear to be interested in competing for the business of a small segment of the market - intensive users of numerous telecommunications and TV services. The group of consumers who are attractive to companies is quite small. The drive to expand the infrastructure serves the needs of this small group and leaves the rest behind.[23]

---

[22]*See, e.g.*, "Cable Companies Staking Claim in ISP Race," available at hppt://www.statmarket.com (May 3, 1999) (noting that cable-based ISP's RoadRunner and @Home have nearly doubled their market share since last quarter).
[23]Dr. Mark Cooper and Gene Kimmelman, "The Digital Divide Confronts the Telecommunications Act of 1996: Economic Reality Versus Public Policy," at 3-4 (Feb. 1999). *See also* Remarks of William E. Kennard, Chairman, Federal Communications Commission Before the National Association of Regulatory Utilities Commissioners (NARUC), San Francisco, CA (July 19, 1999) ("Some companies have said that rural America will never be fully

CoreComm submits that the only way to ensure elimination of the "digital divide" described above is to create a market environment that will stimulate the billions of dollars of public and private investment necessary to finance the construction and operation of competitive broadband networks in all areas of the United States.[24] Such financing will not be available if investors perceive that the current regulatory framework prevents broadband competitors from maximizing the potential of their networks via competitive offerings of multichannel video programming services to consumers. The Commission, however, has the power to solve this problem by taking affirmative steps towards eliminating anomalies in the law that actually defeat competition among incumbent cable operators and alternative MVPDs. For the reasons discussed below, CoreComm believes that the time for the Commission to take such action is now.

---

connected because the economies just aren't there. The fact is that some rural Americans do have access to advanced services, while others do not."); Remarks of Deborah A. Lathen, Chief, Cable Services Bureau, Federal Communications Commission, before the Strategic Research Institute (July 22, 1999) ("[W]e must be mindful of the 'digital divide' we have heard so much about the gap between the information 'haves' and information 'have nots' in our society, and the chasm between blacks and whites, Hispanics and whites, and rich and poor in the use of basic and advanced technology.").

[24] *See, e.g.*, Information Technology Agency Broadband Access Report for the City of Los Angeles, Ref No. PPE-342-99, at 21 (June 18, 1999) (quoting America Online spokesperson: "I think the question is whether or not these high-speed bandwidth services are going to get rolled out. We are not seeing them rolled out very quickly now. . . [T]he cost to install is pretty high; pretty difficult.") (the "Los Angeles Broadband Access Report"); Levenson, "AOL May Join Forces with AT&T After Portland Access Ruling," *Bloomberg News* (June 8, 1999) (available at http://www.totaltele.com) ("Providing cable and phone access to the 100 million households and 20 million businesses in the U.S. 'has always been and will always be the province of the titans,' said Ken McGee, vice president and research fellow at market researcher Gartner Group Inc. 'Startups are not going to provide access for all those locations.'").

B. THE EXISTING PROGRAM ACCESS LAW AND THE CABLE BUREAU'S ENFORCEMENT THEREOF ARE NO LONGER ADEQUATE TO ENSURE THAT BROADBAND COMPETITORS WILL HAVE FULL AND FAIR ACCESS TO PROGRAMMING.

1. The Bureau Has Given Cable Programmers a Green Light to Avoid the Program Access Rules by Migrating Programming to Terrestrial Delivery.

In approving the transfer of TCI's FCC licenses to AT&T, the Commission recognized that:

> the integration of TCI's content with AT&T's coast-to-coast fiber optic network may provide the merged entity with the ability and the cost and quality incentives to migrate video programming from satellite to terrestrial delivery. Such a migration could have a substantial impact on the ability of alternative MVPDs to compete in the marketplace. . . [W]e remain aware of the potential for this type of migration and the possible need to address it in the future.[25]

CoreComm respectfully submits that there no longer is any need for the Commission to speculate whether the cable industry will take advantage of the terrestrial migration loophole in Section 628(b) of the 1992 Cable Act. The cable MSOs are well aware of the economic and technical benefits of fiber delivery, and are rapidly deploying fiber to deliver programming on an exclusive basis to their subscribers. For example, New England Cable News, a regional news network in which MediaOne has an attributable interest, recently migrated from satellite to fiber delivery, citing the cost and technical advantages already recognized by the Commission.[26] Indeed fiber-based networks now deliver local cable programming to substantial numbers of subscribers in a number of markets,

---

[25] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, 15 CR 29, ¶ 37 (1999).

[26] *See* Testimony of Decker Anstrom, President and CEO, National Cable Television Association, before the Senate Antitrust, Business Rights and Competition Subcommittee (Oct. 8, 1997) ("Cable companies are deploying advanced network architectures to interconnect system headend using high capacity fiber optic rings. These architectures allow systems in the same geographical area to share the same headend and production facilities . . . . These shared facilities also enable cable operators to maximize economies of scale in marketing, promotion, administration and production of programming.").

including New York City, Chicago, Philadelphia, Boston, Indianapolis, Minneapolis, Orlando, Columbus, Kansas City and southern New Jersey.[27]

Most alarming, however, is the fact that these ostensibly "local" fiber networks are now being used by regional sports networks as a justification for refusing competitors access to essential sports programming. For example, as reflected in the recent program access complaint filed by RCN Telecom Services of New York, Inc., cable MSO Cablevision Systems Corp., which through Fox Sports Net controls virtually all professional sports programming in the New York market, is now migrating satellite-delivered "overflow" games from MSG Network and Fox Sport Net - New York to Cablevision's fiber-delivered MSG Metro suite of services.[28] Similarly, the Tribune company recently migrated nearly 50 Chicago Cubs games from WGN to the fiber-delivered ChicagoLand Television Network.[29] And, cable MSO Comcast has migrated sports programming in the Philadelphia market to the fiber-delivered Comcast SportsNet.[30] It has been reported that more of these allegedly "local" networks are on the drawing board for additional markets (including San Francisco and Columbus), and that these networks could carry regional sports network programming or perhaps even bid on that programming themselves.[31]

It is no surprise that the cable industry has designated regional sports programming as the primary candidate for satellite-to-fiber migration. The legislative history of the 1992 Cable Act

---

[27] *Id. See also* Umstead, "Ops Eye Low-Cost Local Heroes," *Multichannel News*, at 74 (May 4, 1998).
[28] *See* Program Access Complaint and Petition for Discovery, *RCN Telecom Services of New York, Inc. v. Cablevision Systems Corporation, et al.*, CSR-5404-P (filed May 7, 1999) (the "*RCN Complaint*").
[29] "Ameritech Pressing FCC and Congress for Program Access Rule Changes," *Communications Daily* (Feb. 3, 1998).
[30] *EchoStar Communications Corporation v. Comcast Corporation, et al.*, 14 FCC Rcd 2089 (CSB, 1999); *DirecTV, Inc. v. Comcast Corporation, et al.*, 13 FCC Rcd 21822 (CSB, 1998).
[31] *See* Umstead, n. 13 *supra* ("[Time Warner/Columbus] hopes to turn the tables on the regional sports networks. [It] hopes that the success of [its] local sports network will allow [it] to actually compete with Fox Sports Ohio for the rights to such marquee programming as Cincinnati Reds Major League Baseball and Cleveland Cavaliers NBA games.").

reflects that Congress was well aware that regional sports networks had both the ability and the incentive to discriminate against alternative MVPDs:

> The Committee notes . . . that certain national and regional contracts between sports leagues or teams and video programming services had the effect of discriminating between different technologies in the delivery of sports programming. Because some video programming services are cable-exclusive, . . . [s]ubscribers of other services, such as DBS or wireless cable are denied access to games carried over cable exclusive services. The Committee is concerned that, because of exclusive national coverage contracts, certain sports programming will be available only to subscribers of given technologies.[32]

Recent evidence reaffirms that vertically-integrated cable programmers understand the disproportionate effect regional sports networks have on customer satisfaction in the MVPD marketplace. On this subject there is no better source than Rupert Murdoch, who has made no secret of the fact that News Corp.'s control over sports programming via the Fox/Liberty networks and other channels is a primary source of News Corp.'s market power:

> It is Murdoch . . . who most clearly defined the business logic driving this global trend when, two years ago, he told the News Corp. annual meeting that sports "absolutely overpowers" film and all other forms of entertainment in drawing viewers to television. "We have the long-term rights in most countries to major sporting events," he said at the time, "and we will be doing in Asia what we intend to do elsewhere in the world - - *that is, use sports as a battering ram and a lead offering in all our pay-television operations.*[33]

Finally, any doubt as to the value of regional sports in the MVPD marketplace are laid to rest in Fox's recent lawsuit against Turner Broadcasting System, Inc. ("TBS") over TBS's launch of the Turner South regional cable network.[34] Though described as a general entertainment network,

---

[32]H.R. Rep. No. 102-628, 102d Cong., 2d Sess., at 125 (1992).
[33]Esterl and Scott, "Murdoch's Big Play," *McLean's*, at 56 (Oct. 19, 1998) (emphasis added).
[34]*SportsSouth Network, Ltd. d/b/a Fox Sports Net South, et al. v. Time Warner Inc. and Turner Broadcasting System, Inc.*, File No. 1999CV10083 (Superior Court, Fulton County, GA) filed June 15, 1999).

Turner South plans to broadcast games of the Turner-controlled Atlanta Braves, Atlanta Hawks (NBA) and the Atlanta Thrashers (NHL). The gist of Fox's lawsuit is that TBS's launch of Turner South violates the non-compete agreement TBS signed when it sold its interest in a competing regional sports network, SportSouth, to Fox. In its initial complaint, Fox reaffirms that regional sports programming drives audience share and advertising sales:

> These [Atlanta Braves, Hawks and Thrashers] telecasts attract a large audience due to the widespread support and loyalty of the fans of those teams. In addition, these live telecasts of sporting events also provide the network and the local [cable] operators the opportunity to capture some smaller portion of the sports audience through pre-game and post-game shows and sports news. Regional sports networks also offer other programming most of which is essentially secondary, which allows the network to offer a full 24 hours of continuous programming to fill the remainder of the broadcast day. Because of its generally lower ratings, the secondary [non-sports] programming produces only a small percentage of the network's total advertising revenues and small percentage of the total cable television viewers who watch the network's programs, and has little or no impact on subscription fees paid to local operators or the local operator's decision to carry the network.[35]

Thus, access to regional sports programming is clearly critical to the success of MVPDs in local markets.

Notwithstanding the importance to competitors of access to local and regional sports programming, the Cable Bureau has adopted an extremely limited view of its jurisdiction over terrestrial migration, and in the process provided cable programmers with a template for avoiding their program access obligations by moving programming from satellite to fiber delivery. In

---

[35] *Id.* at 5. *See also id.* at 7 ("From 1995 through 1998, on average approximately 64% of SportSouth's advertising revenues came from telecasts of Atlanta Braves and Atlanta Hawks games, even though those games (including the pre-game and post-game shows) represented only on average each year 195 hours (2.2%) of the approximately 8,760 hours of programming telecast by SportSouth.").

refusing to sanction Comcast's migration of Philadelphia sports programming to the fiber-delivered Comcast SportsNet, the Bureau stated:

> Congress did not prohibit cable operators from delivering any particular type of service terrestrially, did not prohibit cable operators from moving any particular service from satellite to terrestrial delivery, and did not provide that program access obligations remain with a programming service that has been so moved. Thus, given our prior finding that Comcast's actions do not amount to an attempt to evade our rules, we decline to find that Comcast's decision to deliver Comcast SportsNet terrestrially and to deny that programming to DirecTV is "unfair" under Section 628(b).[36]

Implicit in the above quotation is the idea that there is such a thing as a *de minimis* migration of regional sports programming to terrestrial delivery, and that terrestrial migration is not a *prima facie* violation of the program access law where less than 100% of a regional sports network's programming have been moved from satellite to fiber delivery.[37] As shown above, however, regional sports programming (and especially programming of prominent interest to real sports fans, such as playoff games) generally dwarfs most other types of cable programming and thus triggers a disproportionate response from subscribers even when only a small amount of it is unavailable.[38]

---

[36]*DirecTV, Inc.*, 13 FCC Rcd 21822, 21837. It should be noted that the Commission's strict interpretation of Section 628 of the 1992 Cable Act is difficult to reconcile with its far more generous interpretation of Section 623(d) of that same statute, which, as amended by Section 301(b)(2) of the Telecommunications Act of 1996, provides that a cable operator's statutory obligation to provide geographically uniform rates does not apply to "bulk discounts in multiple dwelling units." 47 U.S.C. § 543(d). With no explicit authority from Congress to change the meaning of the term "bulk discount," the Commission declared that "bulk discount" actually means "volume discount," and that the bulk discount exception applies even where a cable operator offers the discount directly to each tenant in an MDU and bills them separately. *Cable Act Reform Report and Order*, CS Docket No. 96-85, FCC 99-57 (rel. March 29, 1999).

[37]*See, e.g., EchoStar*, 14 FCC Rcd 2089, ¶ 23.

[38]*See RCN Complaint*, Exhibit B (Affidavit of Michael J. Steinkirchner, Director, Video Services, RCN Telecom Services of New York, Inc), at 3 (filed May 7, 1999) ("Sports programming is one of the principal lures for cable subscribers. Absent special and unusual circumstances, the more sports programming carried by a cable system, the better, and this is equally true for non-cable MVPDs. The loss of the overflow programming to RCN's subscribers is a very serious competitive matter. In the few months since defendants shut off such programming, RCN has received many complaints from subscribers. . . RCN's business reputation has been damaged by the loss of a product promised to, and valued by, its subscribers. In short, the competitive impact on RCN is adverse and substantial.").

Moreover, by neglecting to clarify exactly how much migration will constitute a *prime facie* violation of the program access law, the Commission has invited cable programmers to test the limits of the Commission's policy at the expense of alternative MVPDs and their customers. Thus, it is hardly a surprise that Cablevision repeatedly cites the Commission's above-quoted ruling on terrestrial migration as supporting authority for its refusal to sell migrated sports programming in the New York market to RCN.[39]

The above-quoted statement also reflects a significantly constrained view that fails to recognize why Congress adopted the program access law and the role Congress intended the Commission to play in ensuring that the intent of the statute is carried out. In at least one other case, the Bureau has gone so far as to suggest that the program access law is a "limited exception" to the general policy that regulatory agencies should not interfere with private contracts entered into by consenting parties.[40] If this is truly representative of the Bureau's current thinking on the program access law, then CoreComm respectfully submits that the Bureau has it absolutely backwards: Congress passed the program access statute not as a "limited exception" to correct an otherwise competitive marketplace, but as an affirmative remedy to counteract cable's widespread abuse of its overwhelming market power vis-a-vis programmers and alternative MVPDs.[41] Indeed, any notion that Congress intended that the program access law be enforced as a "limited exception" is put to

---

[39] *See* Answer of Cablevision Systems Corporation re: File No. CSR-5404-P, at 14-15, 23-30 (filed June 4, 1999).
[40] *See EchoStar Communications Corporation v. Fox/Liberty Networks, LLC, et al.*, 13 FCC Rcd 21841, 21849 (CSB, 1998), *recon. denied*, DA 99-1271 (rel. June 28, 1999).
[41] *See, e.g.*, 1992 Cable Act, § 2(a)(5) ("The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership. As a result, cable operators have the incentive and ability to favor their affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems. Vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies.").

rest by the legislative history of the 1992 Cable Act, which directs the Commission to "address and resolve the problems of unreasonable cable industry practices" and "encourage arrangements which promote the development of new technologies providing facilities-based competition to cable."[42]

Further, there in nothing in Section 628 or its legislative history which suggests that the Commission is statutorily *prohibited* from applying the program access rules to terrestrially-delivered programming.[43] Similarly, there is nothing in the statute which suggests that a significant amount of programming was being delivered terrestrially when Congress passed the statute into law nearly seven years ago. Nor is there anything in the statute which indicates that Congress was aware that programming might eventually be migrated from satellite to terrestrial delivery and deliberately chose to deny competitors any access to such programming on that basis. Against this backdrop, it is more logical to assume that the statute refers solely to "satellite cable programming" simply because satellite transmission was the prevailing mode of distribution at the time the statute was crafted, and Congress simply did not anticipate at the time that cable programming would be migrated to fiber and withheld from alternative MVPDs on that basis.

[42]Conference Report at 93.

[43]It appears that the Bureau has interpreted the reference to satellite-delivered programming in Section 628(b) under the principle of *expressio unius maxim* - - that the expression of one is the exclusion of others. Courts, however, have held that this is "simply too thin a reed to support the conclusion that Congress has clearly resolved the issue." *Mobile Communications Corporation of America v. FCC*, 77 F.3d 1399, 1405 (D.C. Cir. 1995), *quoting Texas Rural Legal Aid, Inc. v. Legal Serv. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) (quoting *Chevron v. NRDC*, 467 U.S. 837, 842 (1984)). Given the pro-competitive intent of the statute and the broad enforcement authority that Congress delegated to the Commission, CoreComm submits that the statute's reference to satellite-delivered programming is more sensibly interpreted as referring to that category of programming which Congress believed *must* be included in the Commission's program access rules. *Id.*, *quoting Texas Rural Legal Aid*, 940 F.2d at 694 ("[A] congressional prohibition of particular conduct may actually support the view that the administrative entity can exercise its authority to eliminate a similar danger.").

Under these circumstances, the fact that Congress did not refer specifically to terrestrially delivered programming in the program access statute does not limit the Commission's authority to interpret the statute as suggested above. The United States Supreme Court has confirmed that Congress meant to confer "broad authority" on the Commission, so as "to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission."[44] Courts thus have recognized that the Commission has substantial latitude when applying Congressional policies to marketplace developments not anticipated when Congress passed the Communications Act of 1934, as amended.[45] Indeed, the legislative history of Section 628 itself suggests that Congress fully expected that the Commission would exercise its broad authority to adapt its program access rules to changed circumstances, so long as the pro-competitive intent of the statute is preserved.[46] CoreComm thus believes that the Bureau's narrow reading of Section 628 is neither

---

[44]*FCC v. Midwest Video Corp.*, 440 U.S. 689, 696 (1979), *quoting FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940 (citations omitted). *See also National Broadcasting Co. v. United States,* 319 U.S. 190, 219 (1943) (Congress granted the Commission "expansive powers" through the Communications Act). *See also* 47 U.S.C. § 154(i) (Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions"); *id.*,§ 303 (Commission has the power to issue rules and regulations "as public convenience, interest and necessity requires").

[45]*See, e.g., FCC v. Pottsville Broadcasting Co.*, 309 U.S. at 138 (1940) ("Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."); *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282, 284 (D.C. Cir. 1966) ("Congress in passing the Communications Act in 1934 could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence in the decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry.").

[46]*See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359, 3374 (1993) (Section 628(b) remains "a clear repository of Commission jurisdiction to adopt additional rules or to take additional action to accomplish statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming").

required by the statute nor consistent with the Commission's broader statutory mandate to promote competition in the MVPD marketplace.[47]

Finally, given the cable multiple system operators' ("MSOs") accelerated efforts to consolidate their operations and thereby widen their already extensive control over local distribution of video programming, this clearly is not the time for the Commission to give vertically-integrated cable programmers free rein to avoid their program access obligations to cable's competitors, whether via terrestrial distribution or otherwise. As already recognized by Chairman Kennard, the Commission's analysis of the program access problem "should focus on the source of any market power involved (the absence of competition at the local distribution level)."[48] Indeed, the Commission has long recognized that concentration of ownership among cable operators is significant in the program access context because it increases the buying power of the cable MSOs and facilitates their ability to coordinate their conduct."[49]

In sum, the marketplace developments discussed above, when viewed in tandem with the Cable Bureau's narrow view of its own authority to deal with the terrestrial distribution problem, is a recipe for precisely the sort of anticompetitive environment Congress intended to eliminate when

---

[47]It should also be remembered that since non-basic cable rates are now deregulated, any Commission policies that permit the cable MSOs to hold exclusive rights to regional sports networks necessarily increases the likelihood that consumers will be forced to pay monopolistic prices for that programming. *See, e.g.*, Sports Programming and Cable Television: Hearing on the Movement of Sports Programming Onto Cable Television Before the Subcommittee on Antitrust, Monopolies and Business Rights of the Senate Committee of the Judiciary, 101st Cong. 11 (1989) (statement of Sen. Joseph Leiberman, discussing the 1988-89 conflict between the Madison Square Garden (MSG) Network and Cablevision over exclusivity) ("[Cablevision] responded by pulling MSG off the air completely, and millions of loyal fans lost their Rangers and Knicks, and almost their Yankees. . . While it is true that the [three teams] are back on the air, the fact is consumers will be paying monopolistic prices for the service. . . It hardly seems fair when the monopolies that control the broadcast of these games have no meaningful restraint on the prices they charge.").

[48]Letter from Chairman William E. Kennard to the Honorable W.L. (Billy) Tauzin, Responses to Questions at 3 (Jan. 23, 1998) (the "Kennard Letter").

[49]*Implementation of Section 302 of the Telecommunications Act of 1996 - Open Video Systems*, 11 FCC Rcd 18223, 18322 (1996).

it adopted the program access provisions of the 1992 Cable Act. If, however, the Commission continues to believe that it lacks the necessary jurisdiction to eliminate the threat of territorial migration, then it should take the next logical step and recommend to Congress that Section 628 of the Act be amended so that the program access law applies to satellite *and* terrestrially-delivered programming. The Commission has made similar legislative proposals to Congress where necessary to preserve the public interest, and the pro-competitive policies underlying Section 628 militate that it do so here.[50]

2. *Vertical Integration Is Not the Exclusive Source of the Program Access Problem, and Thus Section 628's Vertical Integration Restriction Is Insufficient To Serve Its Intended Purpose.*

As noted above, the Commission has taken the view that cable's control over local distribution, not "vertical integration," is the true source of the program access problem.[51] Yet the program access requirements in Section 628 continue to apply only to programming that is vertically integrated, *i.e.*, that in which a cable operator holds an attributable interest.[52] For purposes of program access, the Commission's rules define an "attributable interest" as a *de jure* ownership interest of no less than 5%.[53] The Commission's last annual competition report to Congress reflects that this definition excludes more than 60% of all cable networks from the scope of the program

---

[50] *See, e.g., Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 5 FCC Rcd 4050, ¶ 8 n.6 (FCC proposes to seek legislation increasing the amount of the comparative hearing fee); *Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, MM Docket Nos. 94-149 and 91-140, ¶ 33 (1995) (Commission seeks comment on whether it should proposed legislation permitting a current year credit in minority-controlled corporations).

[51] *See* Kennard Letter, n.30 *supra.*

[52] 47 U.S.C. § 548(b), (c).

[53] 47 C.F.R. § 76.1000(b), notes 1 and 2.

access law.[54] As implicitly recognized by the Commission, however, *all* cable networks, vertically integrated or not, have the same economic incentive to placate incumbent cable operators either by refusing to sell their product to cable's competitors or by only making their product available under rates, terms and conditions that discriminate against cable's competitors.

In addition, that Section 628 only applies to that programming owned by a *cable operator* reflects that Congress clearly did not anticipate that one of the most powerful vertically integrated programmers in the United States (News Corp.) would hold a substantial ownership interest in one of only two domestic DBS operators (EchoStar) that will compete directly with CoreComm and other terrestrial MVPDs for customers.[55] As reflected in CoreComm's filings with regard to the Commission's review of the Fox/EchoStar transaction, CoreComm is concerned that News Corp.'s entry into the domestic DBS market will have anticompetitive consequences for alternative terrestrial MVPDs.[56] At the present time, News Corp. controls access to a major broadcast network, cable entertainment programming networks, and the lion's share of significant national and local sports programming.[57] CoreComm's concern is exacerbated by the financial intertwining of News Corp. and several large United States cable multiple system operators ("MSOs") and News Corp.'s well-

---

[54]*See* GAO Report at 16 (discussing portion of Commission report indicating that only 95 of 245 subscription networks were found to be vertically integrated). CoreComm also asks that the Commission take note of the fact that News Corp.'s recent purchase of Liberty Media's 50% interest in the Fox/Liberty regional sports networks places those networks dangerously close to falling outside the scope of the program access law. It has been reported that Liberty received an 8% nonvoting interest in News Corp. in exchange for agreeing to sell its interest in Fox/Liberty. News Corp. will hold the Fox/Liberty networks through its 81.4% subsidiary, Fox Entertainment Group. As a result, Liberty effectively would hold only 6.5% of FEG's equity (8% x 81.4% = 6.5%). It is entirely possible that Liberty's equity interest in FEG could fall below the program access benchmark of 5% if News Corp. conducts any further transactions with its own stock.

[55]*See MCI Telecommunications Corporation*, n. 7 *supra*.

[56]*See* Request for Imposition of Conditions filed by CoreComm Limited re: File Nos. SAT-ASG-19981202-000993 and SES-ASG-19981204-01829(4) (filed Jan. 14, 1999, amended Jan. 19, 1999).

[57]*Id.* at 15-19.

documented willingness to afford those MSOs favorable treatment in connection with access to programming.[58] Based on this history, CoreComm sees a substantial threat that News Corp. will provide favorable treatment in the provision of programming to EchoStar and to News Corp.'s MSO partners, to the detriment of CoreComm and other similarly situated alternative MVPDs.

As in the case of Section 628(b)'s reference to satellite-delivered programming, there is nothing in the statute which suggests that Congress adopted the vertical integration as a permanent barrier to any extension of the program access law to non-vertically integrated programming. Again, however, should the Commission believe otherwise, it can facilitate a solution to the problem by asking Congress to amend Section 628 so that applies to all cable programming regardless of how or by whom it is owned.

3. *Ongoing MSO Consolidation Will Empower Incumbent Cable Operators to Demand and Receive Discriminatory Volume Discounts And Other Concessions from Cable Programmers.*

As noted by other parties, the rapid consolidation of the cable industry will aggravate the already considerable competitive imbalance created by the steep volume discounts which cable programmers offer exclusively to the large MSOs.[59] The comments filed by Ameritech reflect that cable's competitors have consistently been required to pay exponentially higher rates for

---

[58] *Id.*

[59] Comments of BellSouth Corporation *et al*, CS Docket No. 98-102, at 14 (filed July 31, 1998); Comments of the Small Cable Business Association, CS Docket No. 97-248, at 2 (filed Feb. 2, 1998) (noting that a small, independent operator typically pays 50% to 100% more for programming than the large cable MSOs, and that even the "small cable" buying group (the National Cable Television Cooperative) pays up to 40% more for programming than AT&T/TCI or Time Warner). *See also* "Impact of Sports Programming Costs on Cable Television Rates," United States General Accounting Office, Report to the Honorable Byron L. Dorgan, United States Senate, GAO/RCED-99-136, at 11 (June 1999) ("Programmers have an incentive to have their programming available to the greatest number of subscribers possible because, as the number of viewers increases, sodo programmers' revenues from licensing fees and advertising revenue. Therefore, cable operators with a large subscriber base can obtain greater concessions, such as volume discounts, from programmers than small cable operators.").

programming by virtue of the volume discount problem.[60] The anticompetitive effects of such discounts will become even more severe as AT&T and the other large MSOs continue to accumulate even more subscribers and in turn demand even higher volume discounts from cable programmers. In a similar vein, the comments of Hiawatha Broadband Communications, Inc. reflect that Hiawatha has been subjected to per-subscriber rates based upon penetration percentage -- in some cases, the rate per subscriber at lower penetration percentages is three times higher than the rate at higher penetration percentages.[61] Alternatively, Hiawatha has been subjected to pricing that requires payment for a specified percentage of system subscribers (as high as 85%) whether or not they subscribe to the programming service at issue.[62]

It must be emphasized here that the legislative history of the 1992 Cable Act indicates that Congress did not intend to permit the cable MSOs to "end run" the price discrimination provisions of the program access law by extracting excessive volume discounts and other concessions from programmers, or by otherwise encouraging programmers to impose discriminatory terms and conditions on alternative MVPDs. Indeed, Congress specifically made a point of eliminating any reference to volume discounts in Section 628; in its place, Congress included language that imposes a reasonableness requirement on any prices lowered to account for economies of scale, cost savings or other direct and economic benefits attributable to the number of subscribers served by the cable

---

[60] Ameritech Comments at 11-13.

[61] Hiawatha Comments at 10.

[62] *Id.* Hiawatha's comments also reflect that price is not the only means through which programmers impose onerous terms and conditions on cable's competitors. *See id.* (citing tiering requirements, the tying of programming services to other channels, and minimum penetration requirements as examples of abusive programmer practices).

operator at issue.[63] In other words, Congress recognized that "pure" volume discounts are discriminatory if they bear no reasonable relationship to the programmer's actual cost savings or other economic benefits associated with distributing a cable network to large numbers of subscribers at once.

At the present time, however, the only means by which to determine whether a programmer's volume discounts and other pricing practices are discriminatory is via the Commission's complaint process, which the agency has already recognized is a highly inefficient method by which to attack anticompetitive practices by cable operators and/or programmers.[64] Moreover, since the Commission does not give program access complainants a mandatory right of discovery in price discrimination cases, the complaint process itself is at best an extremely flawed vehicle through which to determine whether a programmer's pricing practices are discriminatory. Simply stated, the Commission has no procedures in place through which it can evalutate the pricing problem on a regular basis.

Since all available evidence indicates that the consolidation of the cable MSOs will only worsen the price discrimination problem for alternative MVPDs, CoreComm believes that the time has come for the Commission to address the issue in a comprehensive manner by initiating formal study of programmer pricing practices, particularly as they relate to volume discounts and other terms and conditions that directly or indirectly affect the prices competitors must pay for the popular cable networks. There is precedent for such an inquiry: last year, in an effort to identify the sources

---

[63]Conference Report at 93 ("In lieu of permitting volume discounts, the conference agreement amends the House provision regarding discrimination by satellite cable programming vendors affiliated with cable operators to permit such vendors to establish different prices, terms and conditions which take into account economies of scale, cost savings, or other direct and economic benefits reasonably attributable to the number of subscribers served by the distributor.").

[64]*See Tele-Communications, Inc. and Liberty Media Corp.*, 9 FCC Rcd 4783, 4786-7 (CSB, 1994).

of recent cable television programming cost increases, the Bureau commenced an inquiry to identify discrete subcategories of programming costs, as well as other matters related to cable operators' costs and revenues.[65] A similar type of study, focusing on the relationship between a programmer's actual costs of creating and delivering programming and the rates charged to cable system operators who purchase that programming, would give the Commission a badly needed foundation from which to begin evaluating the seriousness of the price discrimination problem and the need for legislative reform.

C. THE COMMISSION'S SIGNAL CARRIAGE RULES MUST ACKNOWLEDGE THAT ALTERNATIVE MVPDS HAVE NO MARKET POWER VIS-A-VIS LOCAL BROADCASTERS.

1. Retransmission Consent

Congress adopted the retransmission consent provisions of the 1992 Cable Act to remedy a perceived imbalance of market power between incumbent cable operators and local broadcasters. Specifically, Congress found that

> [B]roadcast programming that is carried remains the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of network affiliates, independent television stations, and public television stations. . . Cable systems, therefore, obtain great benefits from local broadcast signals which, until now, they have been able to obtain without the consent of the broadcaster . . . . This has resulted in an effective subsidy of the development of cable systems by local broadcasters.[66]

By contrast, the above-quoted rationale for retransmission consent cannot be sensibly applied to alternative MVPDs, since there is no imbalance of market power between a competitor

---

[65] *See Fifth Annual Report*, Appendix F.
[66] 1992 Cable Act, § 2(a)(19).

who enters the market with no subscribers and a local broadcaster that is already carried by the incumbent cable operator. Indeed, in this situation it is really the broadcaster who holds the better cards, since it already enjoys marketwide distribution (either over-the-air or via cable) and thus can withhold retransmission consent from alternative MVPD with relative impunity. It is for this very reason that CoreComm is concerned that the Commission's current rule prohibiting exclusive retransmission consent agreements (47 C.F.R. § 76.64(m)) will not prevent broadcasters from imposing discriminatory retransmission consent requirements on alternative MVPDs. Like their cable counterparts, the television broadcast networks are highly dependent on the cable MSOs not only for carriage of their off-air analog signals, but for their own cable networks (*e.g.*, MSNBC, Fox News) and digital television ("DTV") services. It is for this reason that during the initial round of retransmission consent negotiations in 1996, the networks repeatedly gave the cable MSOs exclusivity for their networks in order to secure carriage of their analog signals.[67] The Commission's current "no exclusivity" rule does not explicitly prohibit these types of arrangements, nor does it preclude an incumbent cable operator from achieving *de facto* exclusivity for broadcast programming by striking retransmission consent deals with broadcasters containing terms and conditions that are effectively impossible for competitors to comply with.

Section 325(b)(3)(C)(ii) of the House version of the pending DBS "local into local" legislation (H.R. 1554) would address this problem by requiring the Commission to adopt rules that prohibit broadcast stations from engaging in "discriminatory practices, understandings, arrangements, and activities, including exclusive contracts for carriage, that prevent a multichannel

[67] *See, e.g.*, "Continental, Comcast to Pick Up Fox News," *Media Daily* (Sept. 25, 1996); "NBC's Wright Says Fox-Time Warner News Deal Imminent," *Media Daily* (July 15, 1996).

video program distributor from obtaining retransmission consent from such stations." To protect alternative MVPDs and their customers from the calamitous effects of losing full and fair access to broadcast programming, the Commission should recommend to Congress that this language be retained in the final version of any DBS "local into local" legislation passed and signed into law this year. Furthermore, to ensure that alternative MVPDs are not forced to enter into discriminatory retransmission consent agreements, the Commission should urge Congress to clarify that "discriminatory practices" include non-optional tying and bundling arrangements vis-a-vis network-affiliated cable programming and/or DTV services. Finally, to the extent that the Commission believes that it has no authority to waive its retransmission consent rules in order to foster competition by non-incumbent MVPDs, the agency should make whatever legislative recommendations are necessary to permit the Commission to waive the retransmission consent requirement on a case-by-case basis where it is demonstrated that a broadcaster is imposing terms and conditions for carriage not required of the incumbents with which alternative MVPDs must compete, or where waiver of the rules would serve to promote competition by non-incumbent MVPDs.

2. *Must Carry*

In its pending DTV must-carry rulemaking proceeding, the Commission has proposed to impose DTV must-carry requirements on both incumbent cable operators and cable overbuilders, even though, as noted above, cable overbuilders hold no market power with respect to local broadcasters and thus have neither the incentive nor the leverage to deny carriage of DTV signals on reasonable terms and conditions. As noted by BellSouth in its comments in that proceeding, the

Commission's proposal not only ignores economic reality, but raises a serious question as to whether the imposition of a DTV must-carry requirement on cable overbuilders would survive judicial scrutiny under the First Amendment.[68] Moreover, cable overbuild service was virtually nonexistent when Congress passed the 1992 Cable Act, and there otherwise is no evidence that Congress had cable overbuilders in mind when it included analog must-carry requirements in the statute. Accordingly, in the pro-competitive spirit of removing any and all unnecessary barriers to market entry by new MVPDs, CoreComm supports BellSouth's request for the adoption of an "overbuild" or "new entrant" exemption from any DTV must-carry rules the Commission may adopt in the future.

D. THE COMMISSION'S RULES AND POLICIES FOR EXCLUSIVE CONTRACTS IN MDUS MUST TAKE INTO ACCOUNT THE WIDER IMPACT SUCH CONTRACTS HAVE ON DEPLOYMENT OF NON-VIDEO BROADBAND SERVICES.

CoreComm is aware that the Bureau will soon address the important question of what should be done about exclusive contracts between incumbent cable operators and MDU owners that were entered into before MDU owners had an opportunity to choose among competing providers. In a separate proceeding administered by the Wireless Telecommunications Bureau, the Commission has raised the same issue with regard to exclusive contracts between telecommunications service providers and MDU owners.[69] CoreComm is concerned that the Commission's review of the exclusivity issue in parallel rulemakings will obscure a marketplace phenomenon that may delay

---

[68] See Comments of BellSouth Corporation and BellSouth Interactive Media Services, Inc., CS Docket No. 98-120, at 24-28 (filed Oct. 13, 1998).

[69] *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, FCC 99-141, at ¶ 53 (rel. July 7, 1999).

deployment of non-video broadband services in the MDU environment. Specifically, integrated broadband service providers must be able to offer each strand of the bundle of competitive services in order to generate the return on investment that will be needed to justify the cost of building out advanced platforms. For example, if an incumbent cable operator has an exclusive contract to provide multichannel video service to an MDU, the new entrant may be precluded from offering video services and will be unable to offer its entire menu of broadband services to all tenants in the building. Thus, that exclusive contract may effectively preclude a competing broadband provider from offering *any* non-video broadband services to that same property. This issue bears directly on the Commission's ability to ensure widespread deployment of advanced telecommunications services as mandated by Section 706 of the 1996, and thus CoreComm urges that it be factored into any resolution of the exclusivity issue in the MDU environment.

III. CONCLUSION

CoreComm wishes to emphasize that it is not seeking to preclude the cable MSOs from achieving the economies of scale necessary to promote competition in the local loop. It is only seeking to ensure that the cable MSOs' efforts are pro-competitive for *all* affected parties, not just for the cable MSOs and their affiliated programmers. No less an authority than the Supreme Court has recognized that the Commission is well within its authority to resolve problems that have not yet fully materialized, since "a forecast of the direction in which future public interest lies necessarily involves decisions based on the expert knowledge of the agency."[70] CoreComm merely

[70] *Federal Communications Commission v. WNCN Listeners Guild*, 450 U.S. 582, 594-5 (1980).

asks that the Commission act in accordance with that principle and take the actions recommended above, so that Congress's vision of fully competitive, widely available and affordable broadband services becomes reality in the near term.

Respectfully submitted,

CORECOMM LIMITED

By: Robert D. Primosch

Robert D. Primosch
William W. Huber

WILKINSON BARKER KNAUER, LLP
2300 N Street, N.W.
Suite 700
Washington, D.C. 20037
(202) 783-4141

Its Attorneys

September 1, 1999